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In the Supreme Court of the United States

CPV MARYLAND

Petitioner,

v.

PPL ENERGYPLUS, LLC, *et al.*,

Respondents.

W. KEVIN HUGHES, *et al.*,

Petitioners,

v.

PPL ENERGYPLUS, LLC, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK and NEW YORK STATE ENERGY RESEARCH AND DEVELOPMENT AUTHORITY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI*[1]

The Court's decision in this case will address jurisdictional issues that directly impact the interests and authority of the *amici curiae* herein. The issue before the Court is whether state financial incentives for construction or operation of electric generating facilities are preempted by the jurisdictional bounds established by Congress in the Federal Power Act (FPA). As a state utility regulatory commission, interested in exercising jurisdiction over generation of electricity as a means of addressing system reliability and resource adequacy, *amicus* Public Service Commission of the State of New York ("NYPSC") is directly impacted by this decision. As a state authority that currently

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[1] No other person than the New York Public Service Commission ("NYPSC"), the New York State Energy Research and Development Authority ("NYSERDA") or their counsel authored this brief or provided financial support for it. It should be noted that counsel for the Maryland Public Service Commission in this proceeding represents the NYPSC in a separate matter (*Entergy Nuclear Fitzpatrick, LLC. v. Zibelman*, NDNY Docket No. 5:15-CV-230 [DNH/TWD]), but did not participate in any way in the writing or development of this *amicus* brief. "No motion for leave to file an *amicus curiae* brief is necessary" as the parties have globally consented to filing of *amicus* briefs. Moreover, this brief is being submitted pursuant to Supreme Court Rule 37.4 "on behalf of a city, county, town or similar entity...by its authorized law officer." This brief supports the position of Petitioners. The views expressed herein are not intended to represent those of any individual member of the NYPSC or NYSERDA. Pursuant to N.Y. Pub. Serv. Law (PSL) § 12 (McKinney 2011), the NYPSC Chair is authorized to direct this filing on behalf of the NYPSC.

pays energy production incentives to selected electric generating facilities, *amicus* New York State Energy Research and Development Authority ("NYSERDA") is also directly impacted by this decision.

The NYPSC is a state administrative commission created under the New York Public Service Law. The NYPSC has general regulatory jurisdiction over electric utilities and the provision of retail electric service within the State of New York. It is responsible, *inter alia*, for ensuring that every electric corporation furnishes and provides "such service, instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable." N.Y. Pub. Serv. Law (PSL) § 65(1) (McKinney 2011). It is the duty of NYPSC counsel to represent and appear for the people of the State of New York and the NYPSC in all actions and proceedings involving any question under the Public Service Law or within the jurisdiction of the NYPSC. PSL § 12.

NYSERDA is a public benefit corporation created under the New York Public Authorities Law. NYSERDA is tasked with supporting the development of new energy technologies. N.Y. Pub. Auth. Law (PAL) § 1850-a (McKinney 2011). NYSERDA's powers include supporting renewable energy sources and participating in the development of electric generating facilities. PAL §§ 1854(1)(b) and (3)(d). Since 2004, NYSERDA has administered the Renewable Portfolio Standard (RPS) pursuant to NYPSC authorization. Retail Renewable Portfolio Standard, 2004 N.Y. PUC LEXIS 529 (2004). The

objectives of RPS include encouraging the construction of new renewable generation. *Id.* As part of RPS, NYSERDA pays production incentives on a per megawatt-hour basis to large-scale renewable energy generators selected through a competitive procurement process. *Id.*

Additionally, the State of New York is within a single wholesale electricity market managed by the New York Independent System Operator ("NYISO"). The NYPSC is the only state public utility commission within the NYISO footprint. Therefore, within the NYISO, NYPSC is uniquely positioned to represent the interests of the people of the State of New York in matters concerning electric utility regulation.

SUMMARY

The holding of the United States Court of Appeals for the Fourth Circuit that state incentives to financially support new generation are precluded by both field preemption and conflict preemption clouds States' ability to perform their duty to ensure resource adequacy, a matter reserved to the states by the FPA. The Fourth Circuit found Maryland's provision of an incentive to promote new electric generation, was both field-preempted and conflict-preempted. Maryland ordered retail utilities to execute long-term contracts for differences (CfDs) with the winner of a power plant construction solicitation (the Maryland Order). Under the CfDs, the plant owner would pay or receive the difference between the amount specified in its winning

solicitation and the market price of the underlying energy/capacity if (1) the owner built a new generation plant within the State, and (2) the generator cleared the wholesale market.

Contrary to the Fourth Circuit decision, a state does not invade a field reserved to the Federal Energy Regulatory Commission (FERC) when it orders retail utilities to enter into CfDs with a willing power plant owner. The Fourth Circuit incorrectly held Maryland's incentive to new generation to be an incursion into the field of rates for wholesale sales reserved to FERC. The FPA provides that public utilities agree to wholesale rates in the first instance and gives FERC the exclusive authority to review such rates. 16 U.S.C. § 824(b); *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 10-11 (D.C. Cir. 2002). It carves out state authority to encourage new generation, as long as states do not dictate or review wholesale rates. 16 U.S.C. § 824(b)(1). Through the CfD, Maryland sought to provide the level of incentives necessary to spur the construction of state-needed power plants; it did not seek to review the reasonableness of FERC-approved rates. *See Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601-02 (2015) (holding that state suits directed at practices affecting retail rates were not field-preempted under *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), as they did not constitute an attempt to review the reasonableness of FERC-approved wholesale rates). Thus, contrary to the lower court's reading of *Mississippi Power*, a conflict preemption case, Maryland's program is not field-preempted.

Maryland thus did not invade a FERC-jurisdictional field. FERC lacks jurisdiction to mandate the quantity of available generation; it can only approve rates intended to call forth the quantity it desires. *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481-82 (D.C. Cir. 2009). Maryland was merely exercising, through a CfD, its reserved authority to determine, in the first instance, what it believed was the appropriate quantity of generation. *Id.* at 481. Nor does the CfD, in and of itself, set a rate for a wholesale sale; it is merely a factor FERC can choose to recognize when it reviews the wholesale rates it does set. The Fourth Circuit's erroneous decision leaves an unclear message as to what authority to create and maintain incentives for new and existing generation remains within the sphere of state jurisdiction to ensure resource adequacy. Without reversal, state-sponsored adequacy incentive programs could be nullified or frustrated through extensive litigation as a result of the lower court's holding, even though state authority over generation is protected by the FPA.

In addition, the Maryland CfD program is not conflict-preempted by FERC's creation of interstate markets. The Fourth Circuit erroneously held Maryland's program conflict-preempted because it was field-preempted. Besides apparently confusing field and conflict preemption standards in its handling of *Mississippi Power*, the court ignored that Maryland acted within a field reserved to states and that any impact on wholesale market prices was

indirect and not preempted. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514 (1989). Moreover, there is no conflict between the State and federal jurisdictions. FERC lacks authority to regulate generation facilities, fund their construction or direct retail utilities in their selection of either a type of generation resource or a particular generator when those retail utilities elect to make wholesale purchases. Instead, FERC has authority to set prices for wholesale sales, which may have the effect of creating an encouragement to build new generation. FERC's ability to affect generation supply indirectly is not a basis for conflict preemption. In any event, the court ignored that FERC has the authority to mitigate unreasonable impacts on wholesale market prices, and thereby effectively denied FERC the ability to resolve any jurisdictional tension by using its wholesale rate authority.

The Fourth Circuit's holding that the Order was field-preempted casts a pall of uncertainty over legitimate state exercises of authority to ensure the adequacy of electric generation. The court further compounded the confusion in its holding of conflict preemption because of 1) indirect effects on FERC markets, and 2) circular reasoning that the Order was conflict-preempted because it was field-preempted. The cascade of confusion created by the Fourth Circuit decision has severely infringed upon the NYPSC's ability to implement its goal of substituting gas-fired generation for coal-fired generation in New York. The lower court's decision led to the Dunkirk repowering litigation, wherein a

competitor, citing the Fourth Circuit's decision, is challenging the repowering of a coal-fueled plant with natural gas in New York, even though the state's incentive for the repowering was structured as a payment for the installation of gas-fired capability, which was neither a sale on the FERC market, nor conditioned on the utility's clearing the federal market. *See Entergy Nuclear Fitzpatrick, LLC. v. Zibelman*, NDNY Docket No. 5:15-CV-230 (DNH/TWD), motion to dismiss pending. The lower court's decision creates more questions than it provides answers, and States and participants require the guidance of this Court through reversal of the Fourth Circuit's incorrect application of field and conflict preemption.

ARGUMENT

The Fourth Circuit's erroneous decision interferes with the states' ability to use incentives to ensure generation resource adequacy.

A. Maryland's CfD program is an appropriate incentive under state authority reserved by the FPA.

Maryland's CfD program was properly created as an incentive for the promotion of new generation and was not subject to field preemption as an attempt to dictate wholesale rates. Maryland acted well within its authority under the FPA, and did not set foot in a federal jurisdictional field. The Fourth Circuit decision causes harmful confusion by holding that there is field preemption when none exists.

1. The FPA splits jurisdiction between states and FERC, but grants FERC no power over the adequacy of generation.

The FPA identifies the state and federal jurisdictions within the energy field. While it grants FERC authority over "the sale of electric energy at wholesale in interstate commerce," 16 U.S.C. § 824(b)(1), it clarifies the scope of that power. In particular, the FPA preserves state jurisdiction over generation and local distribution, 16 U.S.C. § 824(b)(1), including "'integrated resource planning and utility buy-side' decisions and 'utility generation and resource portfolios,'" *New York v. FERC*, 535 U.S. 1, 24 (2002) (quoting FERC Order No. 888, 75 FERC ¶61,080 (1996)). Pursuant to its authority over generation adequacy, the "state[ ] remains free to subsidize the construction of new generators" so long as it does not dictate or attempt to review wholesale rates. *New Eng. Power Generators Ass'n v. FERC*, 757 F.3d 283, 291 (D.C. Cir. 2014) (internal quotation marks and citations omitted).

Since the Maryland Order only directed a purchase by a retail utility, and did not set a rate for the sale of generation at wholesale, it cannot be field-preempted. Likewise, even if the CfD entered into in conformance with the Order were such a rate, it would not be preempted, but would instead be subject to FERC's jurisdiction to review rates for wholesale sales. FERC's authority with respect to wholesale rates, as defined in FPA sections 205 and

206, 16 U.S.C. §§ 824d(b) and 824e(a), is confined to the "review [of] rates and contracts made in the first instance by [public utilities] and, if they are determined to be unlawful, to remedy them." *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956) (interpreting analogous provisions under the Natural Gas Act). Inasmuch as the generator, "like the seller of an unregulated commodity," has the right to initially set rates subject to FERC's review, Maryland did not step into a field reserved to FERC. *Atl. City Elec. Co.*, 295 F.3d at 10-11 (holding that FERC cannot deny a utility owner its statutory right to set the rates it will charge, subject to FERC's review) (quoting *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.*, 358 U.S. 103, 113-14 (1958)); *see United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* 350 U.S. 332, 341 (1956).

2. Maryland's incentives for new generation do not step into the area of price setting reserved to FERC.

It is not beyond the states' jurisdiction to require retail utilities to execute CfDs at prices offered by willing power plant owners. Maryland selected the winning bid, but did not change or dictate the terms of that bid. The CfD is a State-authorized, supply-side variable incentive that moves in relation to the market price of capacity. With this mechanism, the State mitigates the risk of electric ratepayers paying either too much or too little incentive over the life of a contract needed to procure the generation that the State believes is in

the best interests of its residents. The Fourth Circuit observed that the generators would be paid if their sales "cleared" in the wholesale capacity market. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014). That provision simply means that the State will receive the benefit of its bargain. In order to count toward a utility's capacity purchase requirement, the plant must "clear" the PJM auction. If it fails to clear, the State's ratepayers will pay twice for the capacity provided by the new power plant. Pet. App. 495-6a. Inasmuch as a State is permitted to offer incentives to promote construction, Maryland's direction that retail utilities execute CfDs falls within the State's jurisdiction over generation adequacy. *See* 16 U.S.C. § 824(b)(1); *New York v. FERC*, 535 U.S. at 24.

The Fourth Circuit concluded that the Maryland Order was field-preempted because the CfD's guaranteed price effectively replaced any rates that the generator would otherwise earn in the FERC-approved auction. That conclusion not only reflects the court's misunderstanding of the FPA's jurisdictional structure, but also the standards for field and conflict preemption. The Fourth Circuit relied on *Mississippi Power*, finding that case "illustrative" with respect to field preemption. *Nazarian*, 753 F.3d at 476. As this Court recently observed, however, "*Mississippi Power* . . . is best read as a conflict pre-emption case, not a field pre-emption case." *Oneok*, 135 S. Ct. at 1601-02 (internal quotation marks and citations omitted).

Regardless, unlike the state action challenged in *Mississippi Power*, Maryland did not attempt to challenge the reasonableness of any wholesale rates for purposes of setting retail rates. *Mississippi Power*, 487 U.S. at 374. Rather, Maryland sought to determine the level of incentive necessary to encourage the construction of a power plant. FERC's authority over wholesale rates does not pre-empt the states' authority to offer incentives for the construction of generation needed to meet state reliability, fuel diversity, or environmental goals. *Cf. Oneok*, 135 S. Ct. at 1602 (holding that state lawsuits that challenged the background marketplace conditions affecting rates were not preempted under *Mississippi Power* because they did not seek to challenge the reasonableness of FERC-reviewed rates).

In any event, Maryland did not invade a FERC-jurisdictional field. FERC lacks jurisdiction to mandate the quantity of generation available anywhere. *Connecticut Dep't of Publ. Util. Control*, 569 F.3d at 481-82. In that case, FERC conceded that it lacked any authority over generation facilities, i.e., quantity. *Id.* at 481. The D.C. Circuit correctly decided that States retain authority to determine quantity in the first instance, recognizing that FERC's task is to set an appropriate wholesale price for that quantity, based on supply and demand. *Id.* at 481-82. Maryland was merely exercising its traditional authority, reserved to it by Congress, to determine in the first instance what it believed was the appropriate quantity of generation to meet its ratepayers' needs. *Id.* at 481.

3. The Fourth Circuit's erroneous decision has created confusion, harming states.

The Fourth Circuit's flawed decision has substantially impeded the states' ability to encourage clean energy generation, because it sparks litigation, such as the challenge to the Dunkirk repowering, *see Entergy v. Zibelman*, *see supra* pp. 6-7, thereby delaying and obstructing the completion of needed clean energy projects. The decision should be reversed to prevent disappointed and litigious competitive electric generators from mounting disruptive and time-consuming challenges to the states' exercise of their traditional authority over electric generation. Contrary to the Fourth Circuit's claim, its decision is not limited in scope. *Nazarian*, 753 F.3d at 478. By finding field-preemption where Maryland did not dictate wholesale rates, or review the reasonableness of such rates, the Fourth Circuit effectively erased the "bright line rule" that "Congress meant to draw between state and federal jurisdiction." *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215-216 (1964).

The Fourth Circuit's decision is in derogation of any "bright line," because it is unclear which state incentives, if any, can survive the court's sweeping decision.[2] Seemingly, under the Fourth Circuit's

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[2] The Fourth Circuit stated that it "need not express an opinion on other state efforts to encourage new generation, such as direct subsidies or tax rebates that may or may not differ . from the Maryland initiative. It goes without saying that not 'every state statute that has some indirect effect' on wholesale rates is preempted." *Nazarian*, 753 F.3d at 478 (citation

reading of *Mississippi Power*, even such means to encourage new generation, such as the "utilization of tax exempt bonding authority [and] the granting of property tax relief," that the Third Circuit listed as permissible in an otherwise faulty decision, *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 254 n.4 (3d Cir. 2014), would be field-preempted were the state deemed to have affected generator revenues.

B. FERC's indirect regulation of generation incentives cannot conflict-preempt Maryland's incentive program because Congress reserved generation adequacy to states, and, in any event, the FPA provides a mechanism for resolving any jurisdictional tensions.

Even if the Fourth Circuit's decision that Maryland's use of CfDs was field-preempted can be construed as having limited effects, there are no such limits from its decision that the Maryland program was also subject to conflict preemption. The Fourth Circuit held such preemption exists because the state incentive for new generation allegedly conflicted with FERC's desire to equalize incentives for new and existing generation. *Nazarian*, 753 F.3d at 473, 479. Under that view, however, any state incentives for new generation

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omitted). Since the Fourth Circuit did not, however, satisfactorily explain why Maryland's use of CfDs meant it set wholesale rates, there is nothing in the court's decision that would show why other incentives would pass muster. The Fourth Circuit apparently relied on effects CfDs have on generator revenues, but other types of incentives may well be deemed to have similar effects.

would fail as preempted because of the inevitable effect of new generation on wholesale prices. Such sweeping preclusion of state incentives would contravene the Congressional goal of preservation of state authority over generation.

The Fourth Circuit presents a bewildering series of arguments to support its holding that Maryland's incentives for new generation are precluded by conflict preemption because those incentives are allegedly in conflict with FERC wholesale rates that also encourage new generation, albeit at lesser levels. First, the Fourth Circuit attempts to bolster its claim for conflict preemption with its holding of field preemption, even though it confuses the standards for both in relying on *Mississippi Power*. Second, the court points to alleged "conflicts" with federal policies, without recognizing that the standard is whether it is possible for federal market participants to comply with both federal requirements and the state program in question. Third, the court then suggests that Maryland, acting within its preserved authority under the FPA to stimulate new generation, is in conflict with the federal programs designed to influence generation growth, though generation clearly falls within the jurisdiction Congress reserved for the states. Fourth, in a *non sequitur*, the Fourth Circuit holds that conflict exists and applies preemption because FERC exercised its authority over wholesale pricing to satisfactorily resolve the situation and eliminate any conflict.

1. Field preemption and conflict preemption are separate, not reinforcing, tests.

The Fourth Circuit stated that in this case, field and conflict preemption are "mutually reinforcing." *Nazarian*, 753 F.3d at 478. This conclusion incorrectly rests, however, on *Nw. Cent. Pipeline Corp.*, 489 U.S. at 515-17. That case rejected claims of conflict preemption based on indirect effects of state regulation in a very similar case.

The lower court began by properly identifying the test for the applicability of conflict preemption, as when the state law in question "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Nazarian*, 753 F.3d at 478 (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000)). Even if Congress has not occupied the field, state law is pre-empted when compliance with both state and federal law is impossible. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963).

Rather than providing an analysis based on the rule it cited, however, the Fourth Circuit concluded that because field preemption exists, therefore conflict preemption must also be present. The court properly recognized that the FPA created a system of "interlocking" jurisdiction. *Nazarian*, 753 F.3d at 478. In this regard, "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary such

case-by-case analysis." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). In particular, Congress reserved to the states jurisdiction over local distribution and generation. 16 U.S.C. § 824(b)(1), *New York v. FERC*, 535 U.S. at 20. States have regulatory authority over "reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions, including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose non-bypassable distribution or retail stranded cost charges." *New York v. FERC*, 535 U.S. at 24 (citing, Order No. 888, 75 FERC ¶61,080, at P 31,782, n. 543 (1996)).

The Fourth Circuit also recognized that under an interlocking system, tensions will arise as states and the federal government act within their respective spheres, and that confliction preemption must be applied sensitively. *Nazarian*, 753 F.3d at 478. It then abruptly concluded, however, that the impact of state incentives on federal regulation is so extensive as to give rise to conflict preemption under *Nw. Cent. Pipeline Corp.*, 489 U.S. at 515-17. *Nazarian*, 753 F.3d at 478. *Nw. Cent. Pipeline Corp.*, however, rejected claims that state actions having impacts on entities subject to federal regulation gave rise to conflict preemption. Any impacts on federal market participants in this case similarly do not support conflict preemption. Indeed, states "retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to

more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from the [FERC]." *Connecticut Dep't of Pub. Util. Control*, 569 F.3d at 481. Maryland acted within a field reserved to states. Based upon its holding of field preemption, the lower court inappropriately held the state program conflict-preempted, without a demonstration that a factual conflict exists; *i.e.*, that it is impossible to comply with both the federal and state programs.

2. Federal and State programs were not in conflict because dual compliance is possible.

The Fourth Circuit held the State incentive program conflict-preempted, stating Maryland's program impacts price signals in the wholesale market, which promotes FERC objectives. *Nazarian*, 753 F.3d at 478. It concluded that Maryland's plan disrupts the federal scheme by "substituting the state's preferred incentive structure for that approved by FERC." *Nazarian*, 753 F.3d at 478-9. Again, as observed under field preemption, above, the Fourth Circuit erred when it read *Mississippi Power* as a field, rather than a conflict, preemption case. Its conclusion that there is a conflict flows from its failure to recognize that in that case the state rendered compliance with federal regulation impossible. Here, dual compliance is fully achievable.

In *Mississippi Power*, the State precluded retail rate recovery of wholesale cost allocations that FERC had found to be appropriate in setting of wholesale rates. *Mississippi Power*, 487 U.S. at 373-74. The State denial of recovery of wholesale costs was therefore found to be in derogation of FERC authority to set wholesale rates. *Id.* at 374. The Court stated the "state agency's 'efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity.'" *Id.* at 377; *see Oneok*, 135 S. Ct. at 1601-02 (explaining *Mississippi Power).* Here, in contrast, federal market participants will not be denied recovery of federal prices. Those participants that have signed CfDs under the state program will receive incentive payments pursuant to the state program, but dual compliance is not only possible, it is readily achieved through the generator's participation in the market pursuant to the requirements FERC establishes.

In concluding that a conflict exists, the Fourth Circuit stated that the PJM Interconnection, LLC (PJM) new entry price adjustment (NEPA) grants certain new generators a fixed price for three years to support the new entrant until expected demand grows and the market sustains the new generator. *Nazarian*, 753 F.3d at 472. These federal goals of developing new generation and sustaining fledgling plants are not in conflict with Maryland's program. Simply because Maryland's program provides a longer-term benefit to the generator does not create a conflict. A participant in the State program can also be in compliance with PJM. It is possible to

comply with both programs because the State incentive works in concert with the FERC-jurisdictional rate.

3. The Fourth Circuit improperly held the State program conflict-preempted when federal authority indirectly affects matters within the jurisdiction reserved to the states.

Congress very clearly established that authority over generation rests solely with the states. 16 U.S.C. § 824(b)(1). As such, authority over incentives for generation remains with the states. Yet, the Fourth Circuit relied on FERC's use of wholesale clearing prices to stimulate new generation construction as a basis for preemption. It explained that "price signals are not the sole mechanism for incentivizing generation" and notes PJM's NEPA establishes a fixed price guarantee for new producers. *Nazarian*, 753 F.3d at 472. Although those Federal actions were introduced for the purpose of encouraging the supply of generation, which is an area specifically reserved to the States, the Federal government may so impact areas of state jurisdiction so long as it acts indirectly and does not usurp state authority. *See New Jersey Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 96-97 (3d Cir. 2014); *Connecticut Dep't of Pub. Util. Control*, 569 F.3d at 481. But, the federal authority to intervene indirectly in an area that is reserved to the states is not a wedge that opens that area to federal transgression through preemption. Rather, where any federal effect is indirect, it is the explicit

reservation of authority to the states that should prevail.

The Fourth Circuit held Maryland's program conflict-preempted based upon FERC's indirect exercise of its influence into state jurisdiction over generation. FERC's indirect regulation of generation incentives, *see New Jersey Bd. of Pub. Utils.*, 744 F.3d at 96-97; *Connecticut Dep't of Util. Control*, 569 F.3d at 481, cannot displace Maryland's valid incentive program because FERC has no power over generation adequacy. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A] federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority . [it] literally has no power to act, let alone pre-empt the . . . legislation of a sovereign State, unless and until Congress confers power upon it").

The Fourth Circuit never considered that PJM and FERC are stepping into the jurisdictional realm specifically reserved for the states by Congress under the FPA. Since Congress unambiguously communicated its intent of the preservation of state jurisdiction for generation, FERC's use of its wholesale rate authority to indirectly influence construction of new generation should not trump specifically reserved authority over generation adequacy that rests with the states. Conflict-preemption has no proper place here because FERC has no power to preempt state law in the area of generation adequacy.

4. In any event, the Fourth Circuit should have relied on FERC's implementation of a remedy for any jurisdictional tension.

Any tension between federal and state jurisdictions can be resolved by appropriate use of FERC authority over prices for wholesale sales. Specifically, FERC can decide the extent to which generators may earn revenues in its energy and capacity markets by imputing a price floor for their participation, or otherwise taking steps to the extent necessary to create reasonable rates. Such FERC authority provides "a mechanism for resolving jurisdictional conflicts." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 516 n.12; *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375. Therefore, FERC's authority over wholesale electric sales includes the ability to impose mitigation rules that properly recognize the indirect impact of Maryland's incentives on federal markets. *See New Eng. Power Generators Ass'n*, 757 F.3d at 293 (FERC mitigation of capacity bids of subsidized resources means the market is functioning as it would without a subsidy); *cf. Louisiana Pub. Serv. Comm'n*, 476 U.S. at 375 (conflict-preemption analysis had no place because the Communications Act provided a method for resolving jurisdictional conflicts).

In response to the Maryland statutory incentive, FERC amended its own policy to better coordinate the state and federal programs. PJM Interconnection, LLC, 137 FERC ¶61,145, P3 (2011). FERC established the minimum offer price rule (MOPR), designed to prevent manipulation of

clearing prices through market power. *Nazarian*, 753 F.3d at 472. FERC adjusted the MOPR in order to maintain the integrity of its markets against below-cost bidding. PJM Interconnection, LLC, 137 FERC ¶61,145, at P96. FERC's regulatory adjustment resolved any potential or actual conflict between state and federal programs. Both programs could coexist, as actually occurred here in that petitioner CPV Maryland's bid cleared in the capacity auction even after MOPR was applied to it. Pet. App. 126a. Rather than recognize that FERC had resolved any tension, however, the Fourth Circuit inexplicably decided that FERC's mitigation "tends to confirm rather than refute the existence of a conflict." *Nazarian*, 753 F.3d at 479.

Even if there were a conflict between Federal and state programs, FERC should have had the opportunity to remedy the situation by exercising its jurisdiction. Here, in response to the State incentive program, FERC made an adjustment to its own market rules to accommodate the State-subsidized generators. The regulatory agency exercised its expertise and made a change to eliminate any potential conflict; the Fourth Circuit erred when it rejected FERC's decision to mitigate as a basis for finding no conflict and declared the accommodated state program was precluded by conflict preemption.

CONCLUSION

For the foregoing reasons, the Court should eliminate the interference with state authority over generation and the confusion arising from the Fourth Circuit decision by reversing that court. The

Fourth Circuit improperly found both field preemption, without the State ever setting a wholesale price for the sale of electricity, and conflict preemption, without recognizing that 1) incentives reflected in FERC pricing cannot displace state authority over generation resource adequacy, and 2) FERC itself was mitigating the situation. Already, the decision has caused immense uncertainty, and will continue to cloud the "bright line" between state and federal jurisdictions in this area until this Honorable Court provides clarification by reversing the Fourth Circuit.

States and market participants are now subject to uncertainty as to where the jurisdictional line stands with States' ability to promote resource adequacy without "impacting" the wholesale market. Moreover, it is completely unclear why FERC's mitigation of any impact of Maryland's incentive program on wholesale prices would not have remediated any indirect impact on the market. The Fourth Circuit's decision ignores State jurisdiction over generation and resource capacity protected by the FPA, and fails to explain how field preemption occurred, when the State never set or dictated a wholesale rate. It also erroneously found conflict preemption, when FERC's indirect regulation of generation adequacy must give way to state authority over generation, and FERC itself obviated any conflict between federal and state authorities. Based on the foregoing, the Fourth Circuit's decision should be overturned.

Respectfully submitted,

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